

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

ROBIN R. McGINNESS,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

3:04-cv-0666-KJD-VPC

**ORDER**

This action is a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254, by Robin McGinness, a Nevada prisoner. The action comes before the court with respect to its merits. The court will deny the petition.

**I. Facts and Procedural Background**

The state charged the petitioner by indictment with murder with the use of a deadly weapon, first degree kidnaping with substantial bodily harm, and robbery with the use of a deadly weapon. Exhibit 4.<sup>1</sup> The victim was reported missing in March 1999. Some of the victim's bones were found approximately eight months later in the desert near Mesquite, Nevada, but the remains were not identified as such until at least one year later. The coroner determined that the victim was

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<sup>1</sup> The exhibits cited in this order in the form "Exhibit \_\_," are those filed by petitioner in support of his amended petition for writ of habeas corpus and are located in the record at docket # 22, 23 and 24.

1 likely shot in the head and that the wound would have caused instantaneous death. Exhibits 39-42.  
2 Petitioner had purchased items from two different stores using the victim's credit cards, and had  
3 purportedly borrowed money from the victim. *Id.*

4 Prior to trial, petitioner moved to exclude evidence of latex gloves, cable ties, and  
5 duct tape that were removed from his apartment. Exhibit 19. The trial court denied this motion.  
6 Exhibit 22. Petitioner also moved to discharge counsel and to dismiss the charges for failure to give  
7 proper notice of the grand jury hearing. Those motions were denied. Exhibits 28, 31, 32 and 34.

8 A jury trial was held between November 26, 2001, and December 5, 2001. Exhibits  
9 39-43. The jury convicted the petitioner of first degree murder with the use of a deadly weapon, first  
10 degree kidnaping with the use of a deadly weapon and with substantial bodily harm, and robbery.  
11 Exhibits 43 and 45. The state district court sentenced petitioner as follows: count I, to life in prison  
12 without the possibility of parole with an equal and consecutive sentence for the use of a deadly  
13 weapon; count II, to life in prison without the possibility of parole, with an equal and consecutive  
14 sentence for the use of a deadly weapon, to run consecutively to count I; and count III, to a maximum  
15 of 156 months in prison, with parole eligibility in 35 months, to run concurrently to count I. Exhibit  
16 46. A judgment of conviction was entered on February 1, 2002. Exhibit 47.

17 Petitioner appealed, arguing (1) the trial court abused its discretion in denying his  
18 pretrial habeas corpus petition as the state failed to present exculpatory evidence to the grand jury,  
19 (2) the trial court abused its discretion in denying his habeas corpus petition as the evidence adduced  
20 at the grand jury hearing was insufficient to show the crime of kidnaping occurred, (3) the trial court  
21 erred in refusing to admit the statements of an absent witness, (4) the trial court erred in denying his  
22 motion in limine to exclude evidence of latex gloves, cable ties, and duct tape, and (5) the trial court  
23 erred in denying his motion to dismiss the charges on the grounds that the state failed to give proper  
24 notice of the grand jury hearing. Exhibits 48 and 51. The Nevada Supreme Court affirmed  
25 petitioner's convictions. Exhibit 54. Remittitur issued on July 3, 2003. Exhibit 57.

26 On March 11, 2004, petitioner mailed his state habeas corpus petition, alleging ten

1 claims for relief. Exhibit 59. The state district court denied the petition, finding the allegations were  
 2 unsupported by the facts. Exhibit 67. On appeal the Nevada Supreme Court affirmed the district  
 3 court's denial of the petition. Exhibit 70. Remittitur issued on November 9, 2004.

4 The instant federal habeas action was initiated on November 11, 2004 (docket #1).  
 5 This court appointed counsel to represent petitioner (docket #5). A first amended petition was filed  
 6 on November 30, 2005 (docket #21). Respondents moved to dismiss the petition, alleging some of  
 7 petitioner's claims were unexhausted (docket #30). This court granted the motion to dismiss in part,  
 8 finding ground one and a portion of ground five were unexhausted (docket #34). Petitioner elected  
 9 to abandon the unexhausted grounds (docket #35 and 36). Respondents have filed an answer and  
 10 petitioner has filed a reply to the answer (docket #42 and 47).

### 11 **III. Federal Habeas Corpus Standards**

12 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), provides the legal  
 13 standard for the Court's consideration of this habeas petition:

14 An application for a writ of habeas corpus on behalf of a person in  
 15 custody pursuant to the judgment of a State court shall not be granted  
 16 with respect to any claim that was adjudicated on the merits in State court  
 proceedings unless the adjudication of the claim --

17 (1) resulted in a decision that was contrary to, or involved an  
 18 unreasonable application of, clearly established Federal law, as  
 determined by the Supreme Court of the United States; or

19 (2) resulted in a decision that was based on an unreasonable  
 20 determination of the facts in light of the evidence presented in the State  
 court proceeding.

21 28 U.S.C. §2254(d).

22 The AEDPA "modified a federal habeas court's role in reviewing state prisoner  
 23 applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are  
 24 given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002). A state  
 25 court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28  
 26 U.S.C. § 2254, "'if the state court applies a rule that contradicts the governing law set forth in [the

Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000), and citing *Bell*, 535 U.S. at 694).

A state court decision is an unreasonable application of clearly established Supreme Court precedent “if the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Lockyer*, 538 U.S. at 75 (quoting *Williams*, 529 U.S. at 413). The unreasonable application clause “requires the state court decision to be more than incorrect or erroneous”; the state court’s application of clearly established law must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409). *See also Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004).

In determining whether a state court decision is contrary to, or an unreasonable application of, federal law, this Court looks to a state court’s last reasoned decision. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Plumlee v. Masto*, 512 F.3d 1204, 1209-10 (9th Cir. 2008) (en banc).

Moreover, “a determination of a factual issue made by a State court shall be presumed to be correct,” and the petitioner “shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

#### **IV. Discussion**

##### **A. Ground One**

Petitioner abandoned his first ground for relief. Therefore, the court will not address the merits of this claim.

##### **B. Ground Two**

In his second claim for relief petitioner alleges that the trial court’s refusal to grant substitute counsel and failure to inquire into the conflict violated his Sixth and Fourteenth Amendment rights.

1 To compel a criminal defendant to undergo trial with an attorney “with whom he has  
2 become embroiled in irreconcilable conflict is to deprive...[a criminal defendant] of the effective  
3 assistance of counsel.” *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (citing *Brown v.*  
4 *Craven*, 424 F.2d 1166 (9th Cir. 1970)). In some cases the summary denial of a criminal defendant’s  
5 motion for new counsel, without further inquiry into the grounds of the motion, violates the Sixth  
6 Amendment. *Id.* Essentially, a state trial court “has no discretion to ignore an indigent defendant’s  
7 timely motion to relieve an appointed attorney.” *Id.* “However, not every conflict or disagreement  
8 between...[a] defendant and counsel implicates Sixth Amendment rights.” *Id.* at 1027 (citing *Morris*  
9 *v. Slappy*, 481 U.S. 1, 13-14 (1983) (holding the Sixth Amendment does not guarantee a meaningful  
10 relationship between a defendant and counsel)).

11 Petitioner filed a motion to dismiss counsel in the state court prior to trial. Exhibit  
12 32. The motion alleged, without further discussion, that trial counsel had failed to personally  
13 interview witnesses, discuss or investigate a defense, and failed to form a working relationship with  
14 the petitioner. *Id.* The trial court denied the motion at a hearing. Exhibit 34. The trial judge stated  
15 that he did not find there was a legal basis for the motion. *Id.* The Nevada Supreme Court affirmed  
16 the district court’s denial of the claim. Exhibit 70 at 12-13. The court determined that petitioner  
17 “proffered nothing more than bare allegations...and failed to explain how he was prejudiced by his  
18 counsel’s alleged inadequacies.” *Id.* at 13. The court found the district court did not err in refusing  
19 to provide substitute trial counsel. *Id.*

20 The Nevada Supreme Court’s determination was not an objectively unreasonable  
21 application of federal law as determined by the United States Supreme Court. While a state court  
22 has no discretion to ignore a motion to dismiss counsel, here the trial court did not ignore the motion.  
23 The court denied the motion, finding no legal basis for it. Moreover, while the district court did not  
24 further inquire into the grounds of the motion, the Nevada Supreme Court’s determination that this  
25 was not in error is not objectively unreasonable. The court found that the motion to dismiss counsel  
26 was not supported by any factual allegations and thus the petitioner had not shown that counsel was

1 ineffective and new counsel was warranted. The factual findings of the Nevada state courts are  
 2 presumed correct. 28 U.S.C. § 2254(e)(1). There is no indication that the Nevada Supreme Court's  
 3 order on this claim was unreasonable. The court will deny this claim.

### 4 **C. Ground Three**

5 In his third claim for relief petitioner alleges that his Fifth, Sixth, and Fourteenth  
 6 Amendment rights were violated because juror 166 was a biased juror and therefore his inclusion on  
 7 the jury resulted in an impartial jury. Respondents argue that this claim was procedurally defaulted  
 8 in the state courts.

9 Generally, in order for a federal court to review a habeas corpus claim, the claim must  
 10 be both exhausted and not procedurally barred. *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir.  
 11 2003). Procedural default refers to the situation where a petitioner in fact presented a claim to the  
 12 state courts but the state courts disposed of the claim on procedural grounds rather than denying the  
 13 claim on the merits. A federal court will not review a claim for habeas corpus relief if the decision  
 14 of the state court regarding that claim rested on a state law ground that is independent of the federal  
 15 question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31  
 16 (1991). The *Coleman* Court stated the effect of a procedural default as follows:

17 In all cases in which a state prisoner has defaulted his federal claims in  
 18 state court pursuant to an independent and adequate state procedural rule,  
 19 federal habeas review of the claims is barred unless the prisoner can  
 20 demonstrate cause for the default and actual prejudice as a result of the  
 alleged violation of federal law, or demonstrate that failure to consider  
 the claims will result in a fundamental miscarriage of justice.

21 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). For the procedural  
 22 default doctrine to apply, "a state rule must be clear, consistently applied, and well-established at the  
 23 time of the petitioner's purported default." *Wells v. Maass*, 28 F.3d 1005, 1010 (9th Cir. 1994). *See*  
 24 *also Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir. 1996).

25 To demonstrate cause for a procedural default, the petitioner must be able to "show  
 26 that some objective factor external to the defense impeded" his efforts to comply with the state

1 procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external impediment must have  
2 prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).

3 With respect to the prejudice prong of cause and prejudice, the petitioner bears:

4           The burden of showing not merely that the errors [complained of]  
5           constituted a possibility of prejudice, but that they worked to his actual  
6           and substantial disadvantage, infecting his entire [proceeding] with  
7           errors of constitutional dimension.

8 *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (quoting *United States v. Frady*, 456 U.S. 152,  
9 170 (1982)). If the petitioner fails to show cause, the court need not consider whether the petitioner  
10 suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d  
11 528, 530 n.3 (9th Cir. 1988).

12           The instant claim was procedurally defaulted in the state courts. The district court  
13 denied the claim, stating that the issue of whether the jury was tainted should have been raised on  
14 direct appeal. Exhibit 67. The court cited to NRS 34.810(1)(b)(2) (stating a court should dismiss a  
15 habeas petition if the grounds could have been raised on direct appeal or in a prior petition). *Id.* The  
16 Nevada Supreme Court affirmed the lower court's denial of this claim, stating that the issue was  
17 waived as it should have been brought in the direct appeal. Exhibit 70.

18           The Ninth Circuit Court of Appeals has held that, at least in noncapital cases,  
19 application of NRS 34.810 is an independent and adequate state ground. *See Vang v. Nevada*, 329  
20 F.3d 1069, 1074 (9th Cir. 2003); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999). This court finds  
21 that the Nevada Supreme Court's holding that review of petitioner's claim of trial court error was  
22 barred pursuant to NRS 34.810 is an adequate and independent ground. Petitioner's reply only  
23 addresses the merits of the claim, and does not contain arguments relating to "cause" for the  
24 procedural default, therefore the court will deny this claim.

#### 24           **D. Ground Four**

25           Petitioner argues in his fourth claim that his conviction and sentence are invalid and  
26 violate due process, equal protection, and the right to a fair trial because the premeditation and

1 deliberation and malice jury instructions improperly minimized the state's burden of proof.

2 Respondents argue that this claim was procedurally defaulted.

3           Respondents' arguments are correct, and the instant claim was procedurally defaulted  
4 in the state court. The district court denied the claim, stating the claim should have been raised on  
5 direct appeal pursuant to NRS 34.810(1)(b)(2). Exhibit 67. The Nevada Supreme Court agreed, and  
6 affirmed the denial of this claim, finding petitioner had waived the claim by failing to raise it on  
7 direct appeal. Exhibit 70. As was noted above, the Ninth Circuit has found that the application of  
8 NRS 34.810 is an independent and adequate state ground. *See Vang v. Nevada*, 329 F.3d 1069, 1074  
9 (9th Cir. 2003); *Bargas v. Burns*, 179 F.3d 1207 (9th Cir. 1999). This court finds the Nevada  
10 Supreme Court's determination that petitioner's claim was barred pursuant to NRS 34.810 is an  
11 adequate and independent ground. Petitioner's reply only discusses the merits of the claim and does  
12 not suggest any arguments relating to cause for the procedural default. The court will deny  
13 petitioner's fourth ground for relief.

#### 14 **E. Ground Five**

15           Petitioner abandoned all of the allegations contained in this claim except for ground  
16 5(b). In this claim petitioner asserts that his Fifth, Sixth, and Fourteenth Amendment rights were  
17 violated due to improper comments made by the prosecutor during closing arguments. Respondents  
18 contend that this claim was procedurally defaulted below.

19           The instant claim was procedurally defaulted in the state court. Petitioner raised the  
20 claim in his state habeas petition, and the district court denied the claim pursuant to NRS 34.810,  
21 noting that it should have been raised on direct appeal. Exhibit 67. The Nevada Supreme Court  
22 affirmed the lower court's denial of the claim, stating that petitioner had waived the claim when he  
23 failed to raise it on direct appeal. Exhibit 70. This court will not review the instant claim, as the  
24 application of NRS 34.810 has been found to be an independent and adequate state ground. *Vang*,  
25 329 F.3d at 1074; *Bargas*, 179 F.3d at 1207. Petitioner's reply does not contain any meaningful  
26 argument relating to cause for the procedural default. The court will deny this ground for relief.



1           **F. Ground Six**

2           In his sixth claim petitioner argues that trial counsel was ineffective for: (a) failing to  
3 hire experts to testify for the defense; (b) failing to adequately question and challenge juror Hanley;  
4 (c) failing to investigate a receipt for the purchase of wire ties and painters gloves; (d) failing to  
5 adequately cross-examine witness Virginia Foley; (e) failing to investigate witness Scheiben; (f)  
6 failing to locate witness Mary Spratt; (g) failing to prepare petitioner to testify on his own behalf at  
7 trial; (h) failing to object to jury instructions; (I) failing to object to prosecutorial misconduct during  
8 closing arguments; and (j) failing to maintain a working relationship with petitioner which prevented  
9 counsel from adequately representing petitioner.

10           In order to prove ineffective assistance of counsel, petitioner must show (1) that  
11 counsel acted deficiently, in that his attorney made errors so serious that his actions were outside the  
12 scope of professionally competent assistance and (2) the deficient performance prejudiced the  
13 outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984).

14           Ineffective assistance of counsel under *Strickland* requires a showing of deficient  
15 performance of counsel resulting in prejudice, “with performance being measured against an  
16 ‘objective standard of reasonableness,’ . . . ‘under prevailing professional norms.’” *Rompilla v.*  
17 *Beard*, 545 U.S. 374, 380 (2005) (quotations omitted). If the state court has already rejected an  
18 ineffective assistance claim, a federal habeas court may only grant relief if that decision was contrary  
19 to, or an unreasonable application of the *Strickland* standard. *See Yarborough v. Gentry*, 540 U.S. 1,  
20 5 (2003). There is a strong presumption that counsel’s conduct falls within the wide range of  
21 reasonable professional assistance. *Id.*

22           **1. Failure to Hire An Expert to Testify on Behalf of the Defense**

23           In claim 6(a) petitioner contends that trial counsel was ineffective for failing to hire or  
24 investigate an expert that could examine the victim’s remains and testify for the defense. Petitioner  
25 states that the coroner testified at trial that he believed the victim died of a gun shot wound, but  
26 stated on cross-examination that the wound could have been post mortem. Moreover, petitioner

1 states that the coroner also testified that he believed the victim suffered some type of blunt trauma  
 2 injury near the time of death. Petitioner contends that this testimony lent credibility to the state's  
 3 speculations as to how the victim died.

4 The Nevada Supreme Court, in affirming the denial of this claim, stated that the  
 5 petitioner failed to explain what additional evidence an expert could have contributed that would  
 6 have been favorable to the defense. Exhibit 70 at 2. The Nevada Supreme Court's decision is not an  
 7 objectively unreasonable application of *Strickland*. Petitioner failed to show that counsel acted  
 8 deficiently, as he did not argue in the state court what a defense expert would have testified to that  
 9 would change the outcome of the trial. The court will deny this claim.

## 10 **2. Failure to Adequately Question and Challenge Juror Hanley**

11 In claim 6(b) petitioner argues that trial counsel failed to adequately question and  
 12 challenge juror Hanley. The relevant test to determine whether a juror is biased is "whether the  
 13 juror[ ]...had such fixed opinions that [he] could not judge impartially the guilt of the defendant."  
 14 *United States v. Quintero-Barraza*, 78 F.3d 1344 (9th Cir. 1995) (quoting *Patton v. Yount*, 467 U.S.  
 15 1025, 1035 (1984)). See also *Davis v. Woodford*, 384 F.3d 628, 643 (9th Cir. 2004).

16 At trial juror Hanley told the court that he might have difficulty being fair to a  
 17 criminal defendant. Exhibit 36, T 66-67. The trial judge told the juror:

18 Mr. Hanley, all we're asking is that you keep an open mind throughout the  
 19 trial. As you listen to testimony - as a judge quite often I hear testimony  
 20 and as I'm listening to it, it kind of tends to persuade me that, yeah, they  
 21 might be a little correct. But, then I'm waiting to hear the other side of it,  
 22 though, so I'm keeping an open mind there. So, it's not that you aren't  
 23 swayed a little bit, it's just that you're still willing to listen to the other  
 24 testimony and the other evidence, and consider that before you your final  
 25 decision. Can you do that?

26 Prospective Juror Hanley: Yes, Your Honor, I can.

Exhibit 36, T 67-68. Juror Hanley then told the court that he believed that a defendant should defend  
 himself. *Id.* The state then asked the potential juror: "so if the Judge tells you that you don't have  
 to provide any weight to that, whether or not he [the defendant] testifies or does not testify, would  
 you, in fact, weigh it against Robin for not testifying?" *Id.* The potential juror told the court that he

1 would not weigh the defendant's choice to not testify against the defendant and that he would wait  
2 until all the evidence was heard to make a determination. *Id.*

3 The Nevada Supreme Court affirmed the denial of this claim, stating that the  
4 petitioner had failed to show that juror Hanley was biased. Exhibit 70 at 3. Moreover, the court  
5 found that petitioner failed to establish that counsel was ineffective. *Id.* The Nevada Supreme  
6 Court's determination that the juror was not biased is not an unreasonable application of *Quintero-*  
7 *Barraza* and *Patton*.

8 Furthermore, the state court's factual determination cannot be overturned unless this  
9 court cannot "reasonably conclude that the finding is supported by the record." *Cook v. Schriro*, 516  
10 U.S. 802, 816 (9th Cir. 2008); *Miller-El v. Cockrell*, 537 U.S. 32 (2003). The factual findings of the  
11 Nevada state courts are presumed correct. 28 U.S.C. § 2254(e)(1). There is no indication that the  
12 Nevada Supreme Court's order on this claim was unreasonable in light of the evidence presented in  
13 the state court. The court will deny the instant claim.

### 14 **3. Failure to Investigate a Receipt for Purchase of Wire Ties and Gloves**

15 In claim 6(c) petitioner asserts that trial counsel was ineffective for failing to  
16 investigate the receipt for the purchase of wire ties and plastic gloves. In this court petitioner argues  
17 that had counsel located the receipts, petitioner could have proved that the items were purchased  
18 after the victim's disappearance.

19 Petitioner's claim in his state habeas corpus petition merely stated that trial counsel  
20 failed to pursue cash receipts of wire ties and gloves. Exhibit 59. The Nevada Supreme Court  
21 affirmed the lower court's denial of this claim, stating that the petitioner had failed to explain the  
22 relevance of the information and how it would impact the defense. Exhibit 70 at 9. The Nevada  
23 Supreme Court's order was not an objectively unreasonable application of *Strickland*. Petitioner did  
24 not show how trial counsel's failure to investigate cash receipts prejudiced the outcome of his trial.  
25 The court will deny this claim.

### 26 **4. Failure to Adequately Cross-Examine Witness Virginia Foley**

1 In ground 6(d) petitioner alleges that trial counsel was ineffective for failing to  
2 adequately cross-examine witness Virginia Foley. Petitioner contends that counsel should have  
3 asked witness Foley about whether the victim had left a note for petitioner asking petitioner to call  
4 him as he needed petitioner's help. Petitioner argues in the instant petition that this testimony would  
5 have shown that he had no animosity toward the victim.

6 The Nevada Supreme Court determined that trial counsel properly cross-examined  
7 witness Foley. Exhibit 70 at 5. Moreover, the court stated that petitioner did not show how  
8 counsel's failure to ask the witness about the victim's note prejudiced the outcome of trial. *Id.* at 5.  
9 The factual findings of the Nevada state courts are presumed correct. 28 U.S.C. § 2254(e)(1).  
10 Petitioner has failed to meet his burden of proving that the Nevada Supreme Court's decision was  
11 contrary to, or involved an unreasonable application of, clearly established federal law, or that it was  
12 based on an unreasonable determination of the facts in light of the evidence presented in the state  
13 court proceeding.

14 Petitioner did not argue in his state habeas petition that had counsel properly cross-  
15 examined witness Foley that the jury would have heard testimony that the victim needed petitioner's  
16 help and there was no animosity between the two. Moreover, even if petitioner had argued this  
17 below, trial counsel did ask the witness on cross-examination if it was true that she told the police  
18 officers that she did not think the victim had "problems" with any person. Exhibit 42, T 48. Witness  
19 Foley stated that she did not know if the victim had problems with anyone, and thought he did not  
20 have problems with the petitioner. *Id.* Therefore it appears the Nevada Supreme Court did not  
21 unreasonably apply *Strickland*, as counsel's alleged failure to ask the witness about the note the  
22 victim wrote likely did not prejudice the outcome of the trial, as the jury heard testimony that the  
23 victim did not have "problems" with the petitioner. The court will deny this claim.

#### 24 **5. Failure to Investigate Witness Scheiben**

25 In claim 6(e) petitioner argues that trial counsel was ineffective for failing to  
26 investigate witness Erik Scheiben, obtain his voluntary statements, work record, criminal record, and

1 the statement made by Scheiben's mother that would refute Scheiben's trial testimony that he took  
2 care of his brother.

3 The Nevada Supreme Court affirmed the denial of this claim, stating:

4 McGinness did not explain how the introduction of Scheiben's taped  
5 statement would have assisted the defense. Similarly, he did not explain  
6 the purpose or relevance of Scheiben's work record. Furthermore, the  
7 admissibility of Scheiben's criminal record, if any, is questionable. [fn 12:  
8 See NRS 50.095; NRS 50.085; *Patterson v. State*, 111 Nev. 1525, 1534,  
9 907 P.2d 984, 990 (1995); *Givens v. State*, 99 Nev. 50, 52-53, 657 P.2d 97,  
10 98-99 (1983), *overruled on other grounds by Talancon v. State*, 102 Nev.  
11 294, 301 n.3, 721 P.2d 764, 768 n. 3 (1986).] Finally, McGinness  
12 apparently desired his counsel to challenge Scheiben's testimony during  
13 cross-examination that he took care of his handicapped brother with  
14 testimony from Scheiben's mother to the contrary. Such testimony,  
15 assuming it could be produced, would be inadmissible. [fn 13: See NRS  
16 50.085; *Collman v. State*, 116 Nev. 687, 703, 7 P.3d 426, 436 (2000)  
17 (stating that impeachment of a witness on a collateral matter is not  
18 allowed).] Accordingly, we conclude that McGinness' counsel was not  
19 ineffective in this regard.

20 Exhibit 70 at 5-6. Petitioner now argues in this court that counsel could have investigated the above  
21 information in order to impeach Scheiben. Scheiben testified that firearms were stolen from his  
22 residence. One of those firearms was found in petitioner's residence, and another was suspected to  
23 be the murder weapon. Petitioner contends that the state's case was entirely circumstantial, and a  
24 major part of the state's case depended upon Scheiben's credibility. Petitioner asserts that had  
25 counsel investigated there is a reasonable likelihood that the outcome of the trial would have been  
26 different.

1 The Nevada Supreme Court's determination was not an objectively unreasonable  
2 application of *Strickland*. Petitioner did not show, in his state petition, how counsel's failure to  
3 investigate witness Scheiben prejudiced the outcome of trial, or why any of the information would  
4 have helped his defense. Moreover, federal habeas corpus relief does not lie for errors of state law.  
5 *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Pulley v. Harris*, 465 U.S. 37, 41 (1984). To the extent  
6 petitioner is challenging the Nevada Supreme Court's determination that certain testimony would not  
7 have been admissible at trial, petitioner's claim also fails.

8 The court will deny the instant claim.

1                   **6. Failure to Locate Witness Mary Spratt**

2                   In claim 6(f) petitioner alleges that trial counsel was ineffective for failing to locate  
3 witness Mary Spratt, who could have provided a possible alibi for petitioner. Petitioner states that  
4 Spratt would have told the jury that he was in Las Vegas on the day of the victim's disappearance.

5                   The Nevada Supreme Court determined that this claim was without merit. Exhibit  
6 70. The court stated that "as there was no definitive evidence regarding the date or time of Doepke's  
7 [the victim] death, Spratt's ability to provide McGinness an alibi was dubious at best." *Id.* at 6. The  
8 court also noted that petitioner failed to "articulate what additional means he desired his counsel to  
9 undertake to locate Spratt." *Id.* The court concluded that counsel's failure to locate the witness did  
10 not prejudice the outcome of the trial. *Id.* Moreover, the court stated that counsel was not  
11 ineffective for failing to locate the witness. *Id.*

12                  The state court's affirmance of the denial of this claim was not objectively  
13 unreasonable. While the victim went missing on March 21, 1999, it was and is not known when the  
14 victim actually died. Therefore the Nevada Supreme Court's conclusion that there was no prejudice  
15 was not unreasonable. Even if witness Spratt had testified that she saw petitioner on March 21,  
16 1999, the last date the victim was seen, the testimony would not prove that petitioner did not commit  
17 the crimes. Moreover, at trial, defense counsel told the court that he had attempted to locate witness  
18 Spratt, but he and his investigator could not find her. Exhibit 40 at 2.

19                  Finally, even if trial counsel had not diligently attempted to locate witness Spratt,  
20 Spratt's mother, Lora Quartuccio, did testify on petitioner's behalf. Exhibit 41. Quartuccio told the  
21 jury that petitioner came by her house on March 21, 1999, between 9:00am and noon. *Id.* Moreover,  
22 Quartuccio stated that she saw petitioner the following two days. *Id.* Therefore, the jury did hear  
23 evidence that petitioner was in Las Vegas on the day the victim disappeared. Petitioner has not  
24 shown that counsel was ineffective when counsel attempted to locate the witness but was  
25 unsuccessful. Furthermore, petitioner cannot show how the failure to locate witness Spratt  
26 prejudiced the outcome of the trial.

1 The court will deny this claim.

2 **7. Failure to Prepare Petitioner to Testify at Trial**

3 In ground 6(g) petitioner alleges that trial counsel was ineffective for failing to  
4 prepare him to testify on his own behalf at trial. On the last day of trial, the district court advised  
5 petitioner of his right to testify. Exhibit 41. Petitioner did not testify at trial.

6 The Nevada Supreme Court affirmed the denial of this claim, stating that petitioner  
7 chose not to testify at trial. Exhibit 70 at 7. Moreover, the court noted that petitioner failed to  
8 elaborate what additional preparation trial counsel should have undertaken. *Id.* Finally, the court  
9 stated that petitioner had not shown how counsel's failure to prepare him to testify prejudiced the  
10 outcome as petitioner declined to testify. *Id.*

11 The state court's denial of the instant claim was not an objectively unreasonable  
12 application of *Strickland*. Petitioner did not allege what counsel should have done to prepare him to  
13 testify. Moreover, petitioner does not state what he would have testified to at trial that would have  
14 changed the outcome of trial. The court will deny claim 6(g).

15 **8. Failure to Object to Jury Instructions**

16 In claim 6(h) petitioner contends that trial counsel was ineffective for failing to object  
17 to the reasonable doubt, premeditation and deliberation, and malice jury instructions. Petitioner  
18 argues that the instructions improperly minimized the state's burden of proof.

19 **a. Reasonable Doubt Jury Instructions**

20 The state district court instructed the jury regarding reasonable doubt as follows:

21 The Defendant is presumed innocent until the contrary is proved. This  
22 presumption places upon the State the burden of proving beyond a  
23 reasonable doubt every material element of the crime charged and that the  
24 Defendant is the person who committed the offense.

25 A reasonable doubt is one based on reason. It is not mere possible doubt  
26 but is such a doubt as would govern or control a person in the more weighty  
affairs of life. If the minds of the jurors, after the entire comparison and  
consideration of all the evidence, are in such a condition that they can say  
they feel an abiding conviction of the truth of the charge, there is not a  
reasonable doubt. Doubt to be reasonable must be actual, not mere  
possibility or speculation.



1 If you have a reasonable doubt as to the guilt of the Defendant, he is  
2 entitled to a verdict of not guilty.

3 Exhibit 44. The Nevada Supreme Court determined that the instruction on reasonable doubt was  
4 proper. Exhibit 70 at 6-7.

5 The Nevada Supreme Court's order was not an objectively unreasonable application  
6 of federal law. Federal courts have previously upheld the same or similar Nevada jury instructions  
7 on reasonable doubt. *See Nevius v. McDaniel*, 218 F.3d 940, 945 (9th Cir. 2000); *Ramirez v.*  
8 *Hatcher*, 136 F.3d 1209, 1213-14 (9th Cir. 1998) (citing *Victor v. Nebraska*, 511 U.S. 1 (1994)).  
9 Therefore it appears that the jury instruction on reasonable doubt did not improperly minimize the  
10 state's burden of proof. Trial counsel was not ineffective for failing to object to this jury instruction.  
11 This portion of ground 6(h) will be denied.

#### 12 **b. Premeditation and Deliberation Jury Instructions**

13 Next petitioner contends that trial counsel failed to object to the jury instructions  
14 regarding premeditation and deliberation. The trial court instructed the jury on premeditation and  
15 deliberation by stating:

16 Premeditated Murder of the first degree is murder which is perpetrated by  
17 means of any kind of willful, deliberate, and premeditated killing. All three  
18 elements – willfulness, deliberation, and premeditation – must be proven  
beyond a reasonable doubt before an accused can be convicted of  
premeditated first-degree murder.

19 Willfulness is the intent to kill. There need be no appreciable space of time  
20 between formation of the intent to kill and the act of killing.

21 Deliberation is the process of determining upon a course of action to kill as  
22 a result of thought, including weighing the reasons for and against the  
action and considering the consequences of the action.

23 A deliberate determination may be arrived at in a short period of time. But  
24 in all cases the determination must not be formed in passion, or if formed  
in passion, it must be carried out after there has been time for the passion  
to subside and deliberation to occur. A mere unconsidered and rash  
impulse is not deliberate, even though it includes the intent to kill.

25 Premeditation is a design, a determination to kill, distinctly formed in the  
26 mind by the time of the killing.



1 Premeditation need not be for a day, an hour or even a minute. It may be  
2 as instantaneous as successive thoughts of the mind. For if the jury  
3 believes from the evidence that the act constituting the killing has been  
preceded by and has been the result of premeditation, no matter how rapidly  
the act follows the premeditation it is premeditated.

4 The law does not undertake to measure in units of time the length of the  
5 period during which the thought must be pondered before it can ripen into  
6 an intent to kill which is truly deliberate and premeditated. The time will  
vary with different individuals and under varying circumstances.

7 The true test is not the duration of time, but rather the extent of the  
8 reflection. A cold, calculated judgment and decision may be arrived at in  
9 a short period of time, but a mere unconsidered and rash impulse, even  
though it includes an intent to kill, is not deliberation and premeditation as  
will fix an unlawful killing as murder of the first degree.

10 Exhibit 44. The Nevada Supreme Court determined that counsel was not ineffective for failing to  
11 object to these instructions as the instructions were not improper. Exhibit 70 at 6-7. In finding the  
12 instructions for deliberation and premeditation proper, the court cited to *Byford v. State*, 994 P.2d  
13 700, 714-15 (Nev. 2000). In *Byford* the Nevada Supreme Court laid out instructions on  
14 premeditation and deliberation that would be proper. *Id.* The instructions given at petitioner's trial  
15 were identical to, or very similar to, the instructions established in *Byford*.

16 The Nevada Supreme Court's decision was not an objectively unreasonable  
17 application of federal law. The Ninth Circuit, in *Polk v. Sandoval*, 503 F.3d 903, 906-09 (9th Cir.  
18 2007), reversed the federal district court's denial of a petition for writ of habeas corpus where the  
19 Nevada state court had not followed *Byford* and given the new deliberation and premeditation  
20 instruction that included separate definitions for willfulness, premeditation and deliberation. Here,  
21 as has been previously noted, the state district court did follow *Byford* and gave an instruction that  
22 did include separate definitions for willfulness, premeditation and deliberation.

23 The jury instructions given in the instant case do not appear to have violated clearly  
24 established United States Supreme Court precedent, as they did not relieve the state of its burden of  
25 proof with respect to the petitioner's state of mind. *See Sandstrom v. Montana*, 442 U.S. 510 (1979);  
26 *In re Winship*, 397 U.S. 358 (1970). Trial counsel was not ineffective for failing to object to the  
instructions on deliberation and premeditation, as the instructions given were correct. The court will

1 deny this portion of claim 6(h).

2 **c. Malice Jury Instructions**

3 Petitioner next argues that trial counsel was ineffective for failing to object to the jury  
4 instructions relating to malice. Petitioner contends that the jury instruction given was ambiguous.  
5 The district court instructed the jury on malice as follows:

6 Malice aforethought means the intentional doing of a wrongful act without  
7 legal cause or excuse or what the law considers adequate provocation. The  
8 condition of mind described as malice aforethought may arise, not alone  
9 toward the person killed, but may result from any unjustifiable or unlawful  
10 motive or purpose to injure another, which proceeds from a heart fatally  
11 bent on mischief or with reckless disregard of consequences and social  
duty. Malice aforethought does not imply deliberation or the lapse of any  
considerable time between the malicious intention to injure another and  
the actual execution of the intent but denotes rather an unlawful purpose  
and design in contradistinction to accident and mischance.

12 Express malice is that deliberate intention unlawfully to take away the life  
13 of a fellow creature, which is manifested by external circumstances  
capable of proof.

14 Malice may be implied when no considerable provocation appears, or  
15 when all the circumstances of the killing show an abandoned and  
malignant heart.

16 Exhibit 44.

17 The Nevada Supreme Court found the above jury instruction was proper pursuant to  
18 NRS 200.020. Exhibit 70 at 6-7. The Nevada Supreme Court has found similar instructions on  
19 malice to be proper in *Cordova v. State*, 6 P.3d 481 (Nev. 2000). In *Cordova* the court stated that  
20 district courts may instruct juries that malice “may be implied” or that malice “shall be implied.” *Id.*  
21 at 483. Moreover, in *Guy v. State*, 889 P.2d 578, 582-83 (Nev. 1992), the Nevada Supreme Court  
22 upheld similar instructions, finding the instructions accurately define malice and distinguish between  
23 express and implied malice.

24 The Nevada Supreme Court’s determination was not an objectively unreasonable  
25 application of federal law. Trial counsel was not ineffective for failing to object to jury instructions  
26 that were proper, and thus the court did not unreasonably apply *Strickland*. The court will deny this

1 portion of claim 6(h).

2 **9. Failure to Object to Prosecutorial Misconduct**

3 In claim 6(i) petitioner argues that trial counsel was ineffective for failing to object to  
4 nine improper statements made by the prosecutor during closing remarks.

5 Statements made by the prosecution during closing argument are improper when they  
6 infect “the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden*  
7 *v. Wainwright*, 477 U.S. 168, 181 (1986). However, attorneys are given wide latitude during closing  
8 arguments. *Fields v. Brown*, 431 F.3d 1186, 1206 (9th Cir. 2005). Furthermore, questionable  
9 remarks can be cured by jury instructions. *Johnson v. Sublett*, 63 F.3d 926, 930 (9th Cir. 1995).

10 The Nevada Supreme Court affirmed the denial of this claim, stating that after  
11 carefully reviewing the prosecutor’s comments, the comments did not amount to prosecutorial  
12 misconduct. Exhibit 70 at 4. The court further noted that even if trial counsel should have objected  
13 to portions of the state’s closing argument, petitioner did not show that the failure to object  
14 prejudiced the outcome of trial. *Id.*

15 The Nevada Supreme Court’s factual finding is entitled to a presumption of  
16 correctness. 28 U.S.C. § 2254(e)(1). When read in context, the statements petitioner complains  
17 about do not appear to have infected the whole trial with fundamental unfairness. Moreover, the trial  
18 court noted that the closing remarks were not evidence, and that the jury was to consider the  
19 evidence produced at trial. Furthermore, the trial court properly instructed the jury. Exhibit 41. As to  
20 his claim of ineffective assistance of trial counsel, petitioner has met neither *Strickland* prong, as  
21 reasonable defense counsel is not required to make objections lacking merit, and petitioner has not  
22 demonstrated prejudice. The Nevada Supreme Court’s ruling was not contrary to, or an  
23 unreasonable application of, clearly established federal law, as determined by the Supreme Court of  
24 the United States, and that ruling was not based on an unreasonable determination of facts in light of  
25 the evidence. 28 U.S.C. § 2254(d).

26 The court will deny claim 6(i).

1                   **10. Failure to Maintain a Working Relationship with Petitioner**

2                   In claim 6(j) petitioner alleges that trial counsel was ineffective for failing to maintain  
3 a working relationship with the petitioner, which prevented counsel from adequately representing the  
4 petitioner.

5                   The Nevada Supreme Court affirmed the denial of this claim, finding that the  
6 petitioner failed to provide support for this claim. Exhibit 70 at 7. The court concluded that the  
7 petitioner did not demonstrate that counsel was ineffective. *Id.* The Nevada Supreme Court's order  
8 was not an objectively unreasonable application of *Strickland*. Petitioner failed to show, in his state  
9 habeas corpus petition, that trial counsel was ineffective for allegedly failing to maintain a working  
10 relationship with him. Moreover, while petitioner is entitled to effective assistance of counsel, the  
11 Sixth Amendment does not guarantee a meaningful relationship with counsel. *Morris v. Slappy*, 481  
12 U.S. 1, 13-14 (1983). The court will deny this claim.

13                   **G. Ground Seven**

14                   In his seventh claim for relief petitioner alleges numerous instances of ineffective  
15 assistance of appellate counsel. Specifically petitioner contends that appellate counsel was  
16 ineffective for failing to raise on appeal: (1) improper reasonable doubt, premeditation and  
17 deliberation and malice jury instructions; (2) that juror Hanley was biased; and (3) that the  
18 prosecutor committed misconduct during closing arguments. Moreover, petitioner contends that  
19 appellate counsel was ineffective for failing to federalize the issues that were raised on direct appeal  
20 in order to preserve the issues for federal habeas corpus review.

21                   “Claims of ineffective assistance of appellate counsel are reviewed according to the  
22 standard announced in *Strickland*.” *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002). A  
23 petitioner must show that counsel unreasonably failed to discover nonfrivolous issues and there was  
24 a reasonable probability that but for counsel's failures, he would have prevailed on his appeal. *Smith*  
25 *v. Robbins*, 528 U.S. 259, 285 (2000).

26                   The Nevada Supreme Court determined that subclaims (1), (2) and (3) were without merit, as the

1 court had found that the jury instructions were not improper, that juror Hanley was not biased, and  
2 that the comments by the prosecutor did not amount to prosecutorial misconduct. Exhibit 70 at 11.  
3 The court stated that appellate counsel was not ineffective for failing to raise those issues on appeal.  
4 The Nevada Supreme Court did not unreasonably apply federal law in determining that the first three  
5 subclaims were without merit. As was noted above, trial counsel was likely not ineffective for failing  
6 to object to the instant subclaims during trial as the claims were without merit. Therefore, appellate  
7 counsel would not be considered ineffective for failing to raise meritless issues on appeal. *Wildman*  
8 *v. Jackson*, 261 F.3d 832, 840 (9th Cir. 2001).

9           The Nevada Supreme Court also affirmed the denial of the remainder of this claim,  
10 stating that petitioner failed to demonstrate that the results of his direct appeal would have been  
11 different had counsel federalized the issues. Exhibit 70 at 12. The court's determination was not an  
12 objectively unreasonable application of *Smith* and *Strickland*. Petitioner has failed to show that had  
13 counsel raised the claims on direct appeal as federal issues that the outcome of the appeal would  
14 have been different. The court will deny habeas relief with respect to this claim.

#### 15           **H. Ground Eight**

16           In ground eight petitioner alleges that the court should grant relief based upon the  
17 doctrine of cumulative errors. The cumulative error doctrine recognizes that the cumulative effect of  
18 several errors may prejudice a defendant to the extent that his conviction must be overturned. *See*  
19 *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996). The cumulative error doctrine,  
20 however, does *not* permit the Court to consider the cumulative effect of *non-errors*. *See Fuller v.*  
21 *Roe*, 182 F.3d 699, 704 (9th Cir. 1999), *overruled on other grounds, Slack v. McDaniel*, 529 U.S.  
22 473 (2000) ("where there is no single constitutional error existing, nothing can accumulate to the  
23 level of a constitutional violation"). As the Nevada Supreme Court found, petitioner's claims are  
24 without merit, therefore he has failed to demonstrate any cumulative error. This claim fails.

#### 25           **V. Certificate of Appealability**

26           In order to proceed with an appeal from this court, petitioner must receive a certificate

1 of appealability. 28 U.S.C. § 2253(c)(1). Generally, a petitioner must make “a substantial showing  
2 of the denial of a constitutional right” to warrant a certificate of appealability. *Id.* The Supreme  
3 Court has held that a petitioner “must demonstrate that reasonable jurists would find the district  
4 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S.  
5 473, 484 (2000).

6 The Supreme Court further illuminated the standard for issuance of a certificate of  
7 appealability in *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The Court stated in that case:

8 We do not require petitioner to prove, before the issuance of a COA, that  
9 some jurists would grant the petition for habeas corpus. Indeed, a claim  
10 can be debatable even though every jurist of reason might agree, after the  
11 COA has been granted and the case has received full consideration, that  
12 petitioner will not prevail. As we stated in *Slack*, “[w]here a district court  
has rejected the constitutional claims on the merits, the showing required  
to satisfy § 2253(c) is straightforward: The petitioner must demonstrate  
that reasonable jurists would find the district court’s assessment of the  
constitutional claims debatable or wrong.”

13 *Id.* at 1040 (quoting *Slack*, 529 U.S. at 484).

14 The court has considered the issues raised by petitioner, with respect to whether they  
15 satisfy the standard for issuance of a certificate of appeal, and the court determines that none meet  
16 that standard. Accordingly, the court will deny petitioner a certificate of appealability.

17 **IT IS THEREFORE ORDERED** that the first amended petition for a writ of habeas  
18 corpus (docket #21) is **DENIED**.

19 **IT IS FURTHER ORDERED** that the clerk shall **ENTER JUDGMENT**  
20 **ACCORDINGLY**.

21 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**  
22 **APPEALABILITY**.

23 DATED: July 24, 2008



24  
25  
26 UNITED STATES DISTRICT JUDGE